No. 57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

ALBERTO VARGAS,

Petitioner,

VS.

ESQUIRE, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Scheffer Printing Company, Del. 7171

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STATEMENT.

Petitioner, Alberto Vargas, has lived continuously in the United States for the past 32 years (R. 42). The trial court found that he writes, understands and speaks English very well. (Findings 6, 43; R. 776, 781.) Vargas commenced working for Esquire in June of 1940 under a written contract for three years, at a salary of $75.00 per week. (Plf's Ex. 1; R. 711-713, 52) Vargas agreed to devote his entire time exclusively to Esquire. The contract provided that Esquire might sell drawings made by Vargas to outsiders, and, in the case Equire so elected, that Vargas would be paid, in addition to his salary, 50% of the net receipts from the sale of such drawings to outsiders.

Under this contract, Esquire had an option to renew for an additional three years commencing with July 1, 1943

for a salary of $150.00 per week; and in case of such renewal, Vargas was to receive 60% of the net receipts from any Vargas drawings which Esquire might elect to sell to outside companies. (R. 712)

Vargas' drawings, as published by Esquire, were successful and popular, and a harmonious association developed between Vargas and Esquire. Vargas earned under his first contract $8,225.00 for the year 1941 (Defd's Ex. 21, R. 736) and a similar amount for the year 1942 (Defd's Ex. 21, R. 737, 739). Vargas continued to work under his first contract until it expired on June 30, 1943. He was told that Esquire would not exercise the option but would work out and offer him a new contract more favorable than if the option had been exercised (R. 82, 452).

Vargas continued to draw his salary of $75.00 a week during the last half of 1943, but in addition asked for and was given cash advances for various purposes. In particular, Vargas, in June, 1943, requested that Esquire advance him enough money to enable him to bring his elderly mother and his sister from Peru to the United States for a visit, which he stated would require $5,000.00 (R. 79-80). Esquire accordingly advanced him the $5,000.00 and Vargas' mother and sister made the visit (R. 289-290, 348). Primarily because of this unusual advance, Vargas had, at the end of 1943, been advanced by Esquire $5,699.80 more than he would have received had he been paid strictly under the terms of his expired contract. (Finding 14, R. 777.) In order to wipe out Vargas' indebtedness preparatory to making a new contract, a formula was worked out by Esquire which credited Vargas with salary and other compensation for the year 1943 sufficient to wipe out this indebtedness and leave a small balance of $565.85 owing to Vargas, which was paid him.

(Finding 14, R. 777.) Because of this extra compensation, which was tantamount to a bonus, Vargas' earnings for the year 1943 were $15,242.59, or almost double his earnings for the previous year. (Def's Ex. 21, R. 738, 616.)

Commencing January 1, 1944, Esquire began to pay Vargas a salary at the rate of $1,000.00 per month (R. 82-83). On May 23, 1944, the parties signed their second contract, the one here involved (Plf's Ex. 2, R. 713-715, 100), which was by its terms retroactive to January 1, 1944. This contract in effect provided for Vargas a salary of $1,000.00 a month for the first eighteen months, with systematic increases periodically, the final compensation being $1,500.00 a month for the last eighteen-month period. The contract ran for ten and one-half years. Under it Vargas agreed to furnish Esquire twenty-six drawings each six months; to work exclusively for Esquire; and to furnish no art work for anyone competing with Esquire for three years after the termination of the contract. In addition to the foregoing payments, Vargas was to receive ¼ of 1% of the gross receipts received by Esquire from the sale of any calendars, playing cards or other by-products on which Vargas' art work was used. The names "Varga", "Varga Girl", and "Varga, Esq.", which names had been previously used under the first contract, were to belong exclusively to Esquire.

The contract was typewritten on letter size paper, double-spaced, and only three and one-half pages in length. All parts of the contract as to which Vargas now complains were read to him before he signed it (Findings 31, 55, R. 779, 783); and, in addition, he was handed the contract and he and his wife, who handled his business affairs (R. 181, 217), had an opportunity to read it over and study it before it was signed (Finding 44, R. 781).

Vargas signed the contract, and for nearly two years, or until January, 1946, received his compensation and performed his work in accordance with its terms without any complaint or protest whatsoever (Finding 54, R. 783). In fact, after it had been in force for a year and a half, he himself testified that he told Esquire's president he was well satisfied with it. (R. 121-122.) His earnings under the new contract for 1944 were $13,827.87, slightly less than the total amount he had received from Esquire in 1943. His 1943 payments, however, had included the non-recurring item of $5,000.00 advanced to him to bring his mother and sister to the United States. Vargas' earnings under the new contract for 1945 were $15,245.83, which exceeded his earnings for 1943. (Def's Ex. 21, R. 740-741.)

During the two years that Vargas worked under his new contract, Esquire continued to make him advances on request; and the relations between Esquire and Vargas were quite as cordial as they had been previously.

Suddenly on January 10, 1946, Vargas, after consulting a lawyer, came to David Smart, President of Esquire, and complained that his basic salary under the contract was too small. (R. 126-131.) He testified he asked Mr. Smart to write him a new contract under which he would be "happy". (R. 135.) Upon Mr. Smart's refusal to grant this request, Vargas rejected the contract and has furnished no drawings to Esquire since that time. (R. 132.)

ARGUMENT.

I.

The review by the Circuit Court of Appeals of this case was in accord with Rule 52(a) of the Federal Rules of Civil Procedure as interpreted by this Court in U. S. v. U. S. Gypsum Co., 68 Sup. Ct. 525, 92 L. Ed. 556, and in accord with the decisions of the Circuit Courts of Appeal.

Although the trial court concluded as a matter of law that David Smart, president of Esquire, stood in a fiduciary relation to Vargas (Conclusion 1, R. 784) and that the contract should be cancelled, (R. 784, 785) it was respondent Esquire's contention in the Circuit Court of Appeals that the testimony presented wholly failed to support the Court's conclusions. For this reason respondent Esquire's statement of facts in the Circuit Court of Appeals followed the testimony of the Vargases and assumed that it was true, except in those instances where the trial court made express findings contrary to Vargas' contentions. The District Court, for example, found against Mr. Vargas as to the most sharply disputed issue of fact in the case, namely, the date on which the disputed second contract was signed. Vargas and Mrs. Vargas testified that it was signed on May 23, 1945, (R. 95-96, 201-202, 299, 349) but the Court found (Finding 29, R. 779) as contended by respondent's witnesses, that the contract was actually signed on May 23, 1944. The effect of this finding of the District Court was to show that Vargas had worked and been paid under the questioned contract *without protest,* for a year and eight months after it was signed, and not merely eight months as Vargas claimed.

Respondent's contentions, that the evidence and findings wholly failed to support the decree, were upheld by the Circuit Court of Appeals, which said:

> "We are not unmindful of the fact that the trial judge heard and saw the witnesses and that his decree should not be disturbed unless clearly erroneous; nevertheless, under the circumstances here appearing, measured by the applicable law, we think *the decree is without evidence to support it;* hence, it should not be allowed to stand." (R. 805)

Petitioner has summarized in his petition some of the trial court's findings (Pet'n p. 9, 10) in fifteen numbered paragraphs. The findings summarized by petitioner in paragraphs 1, 2, 6, 7, 8, 9, 10, 12 and 13 were not disputed in either court below but are of no significance to petitioner's case. Some of them show that Vargas was well and generously treated by Esquire, particularly in the matter of cash advances against future earnings, but this is scarcely a matter to be held against Esquire.

Respondent contended in the Circuit Court of Appeals that the other findings listed by petitioner (paragraphs 3, 4, 5, 11, 14 and 15) were not supported by the evidence, or that they were erroneous conclusions of law.

Some of these "findings" go entirely beyond any testimony in the case. There is no testimony that the Vargases (Par. 4) *always* consulted Mr. Smart about their apartments or furnishings; their own testimony is that while at times they did, on other occasions they chose apartments and furnishings without consulting him (R. 252, 336, 264). The court's finding that David Smart was a "frequent visitor" at Vargas' apartment (Par. 5) fails to point out that Vargas' home or apartment was also his studio, where he drew his pictures; and is scarcely sup-

ported by testimony that Smart did not visit the studio *as often as once every two months.* (R. 340) Indeed Mrs. Vargas testified: "There were times when he would come two or three times in succession to see how the work was progressing; there were times when he didn't come for months." (R. 340). It is certainly not extraordinary that Mr. Smart called at the studio of one of his key artists five or six times a year, if he did, to see how a picture was progressing.

The Circuit Court of Appeals rejected as "clearly erroneous" the lower court's conclusory finding challenged by respondent, that Mr. Smart took an "unusual interest" in everything pertaining to their lives. (Par. 3) Mrs. Vargas had herself characterized Mr. Smart's interest in her husband and herself as follows: "He seemed to take a friendly interest in us." (R. 348) It was respondent's contention that a friendly interest in a key artist under contract is hardly peculiar, and does not give rise to a fiduciary relation. The Court of Appeals agreed that Esquire and its president had a legitimate interest in Vargas; in seeing that he had an agreeable place in which to do his work; and in seeing, if they could, that the wants and desires of his artistic temperament were satisfied. (R. 800, 801)

The trial court's finding that David A. Smart "had complete control of the work done by plaintiff for defendant to be sold by others," and that plaintiff for his earnings from said work necessarily depended on the judgment of Mr. Smart (Par. 11), failed to point out that all this was according to the plain terms of Vargas' *first contract* with Esquire, which contract was never at any time questioned by him. Under that contract, all art work drawn by Vargas, the employee, belonged to Es-

quire, the employer. When and if any was sold to outsiders, Vargas received his percentage, strictly under the contract (Plf's Ex. 1, R. 711-713). No claim is made that he did not always receive what he was entitled to.

The conclusions summarized in paragraphs 14 and 15 (Pet'n, p. 10) to the effect that David Smart invited and had the special trust and confidence of plaintiff far beyond that ordinarily existing between employer and employee (Finding 23, R. 779) and that at the time of the signing of the contract plaintiff did not act as a "free agent" (Finding 38, R. 781) are not proper findings of fact. They are properly conclusions of law, which have no presumption of correctness in the reviewing court, *and were properly labeled conclusions of law by the trial court.* (Conclusions 1 and 5, R. 784.) The Circuit Court of Appeals in discussing the trial court's conclusion of fiduciary relationship referred to it as a conclusion of law. (R. 799, 801.) At most, the conclusions that a fiduciary relation existed here and that petitioner did not act as a free agent are conclusions of mixed law and fact. As pointed out by this Court in the early case of *Ogilvie* v. *Knox Mach. Co.,* 59 U. S. 577, 18 How. 577, 15 L. Ed. 490, the question of the existence of fraud is always a mixed question of law and fact.

It is well established, as recently held by this Court in *U. S.* v. *U. S. Gypsum Co.,* 68 Sup. Ct. 525, 542, 92 L. Ed. 556, that in an equity action such as this, where the facts are found by the Court without a jury, an Appellate Court is not bound by the determinations of the District Court *on a mixed question of law and fact.* Other cases announcing the same rule with regard to the scope of review of questions of mixed law and fact are *Bogardus* v. *Comm. of Int. Rev.* (1937), 302 U. S. 34, at 39; 58 S. Ct.

61, 82 L. Ed. 32; *Bell* v. *Porter* (7th Circ., 1946), 159 Fed. (2d) 117, at 120; *Exmoor Country Club* v. *U. S.* (7th Cir., 1940), 119 Fed. (2d) 961, at 963; *Becker* v. *Loew's Inc.* (7th Cir., 1943), 133 Fed. (2d) 889, at 894; *U. S.* v. *Anderson* (7th Cir., 1939), 108 Fed. (2d) 475, at 479.

Furthermore, the finding of a fiduciary relation is even more clearly one of law, or, at most, of mixed law and fact under the law of Illinois, which holds that a fiduciary relation may never be established, except by "proof clear, convincing and *so strong as to lead but to one possible conclusion*". *Stewart* v. *Sunagel*, 394 Ill. 209, 68 N. E. (2d) 268; *Finney* v. *White*, 389 Ill. 374, 59 N. E. (2d) 859; and *Johnson* v. *Lane*, 369 Ill. 135, 15 N. E. (2d) 710.

Whether the proof of fiduciary relation in this case was indeed so clear, so convincing and so strong "as to lead to but one possible conclusion" was properly for the Circuit Court of Appeals to decide as to a question of law, or of mixed law and fact. Although this Illinois rule as to degree of proof in a case of this type is undisputed, the trial court appears to have wholly disregarded it; at least the trial court failed to include such rule among its conclusions of law.

It is therefore clear that the District Court's conclusions of law or of mixed law and fact as to the existence of a fiduciary relation, and that there was fraud in the execution of the contract were not binding upon the Circuit Court of Appeals, and in reaching contrary conclusions the reviewing court was acting within its proper powers of review as prescribed by Rule 52(a) of the Federal Rules of Civil Procedure. It therefore did not apply or construe Rule 52(a) contrary to the decisions of this court or of other circuits, as petitioner contends.

As the Circuit Court of Appeals held, the evidence in the record, together with the proper findings of evidentiary fact not found to be "clearly erroneous" showing a friendly business relationship between David Smart and Vargas, do not establish under Illinois law a relationship of special trust and confidence. *Finney* v. *White,* 389 Ill. 374, 59 N. E. (2d) 859.

Similarly, evidence of belief in the honesty and integrity of a close and intimate friend has been held insufficient to establish a fiduciary relation. *Higgins* v. *Chicago Title and Trust Co.* (1924), 312 Ill. 11, at 18-19, 143 NE 482; *Bordner* v. *Kelso* (1920), 293 Ill. 175, 127 N. E. 337. And evidence of employer-employee and debtor-creditor relationships is not sufficient to create a fiduciary relation. *Doheny* v. *Lacy,* (1901) 168 N. Y. 213, 61 N. E. 255; *Guffey* v. *Washburn,* 382 Ill. 376, 46 N. E. (2d) 971.

It is readily apparent that the Circuit Court of Appeals did not, as petitioner contends, try the case *de novo* and overrule all of the trial court's findings of fact. It obviously accepted most of the trial court's evidentiary findings; but found some of the findings discussed herein clearly erroneous, and concluded that the high water-mark of plaintiff's evidence, viewed in the light of the supported findings of the District Court, did not, as a matter of law, establish a fiduciary relation by that high degree of proof required by Illinois law. The Circuit Court of Appeal's conclusion (R. 801) that a fiduciary relationship did not exist between plaintiff and David A. Smart, as a matter of law, was of course, clearly in accord with Rule 52(a), which does not limit in any way the reviewing court's right to set aside conclusions of law of the trial court.

And even if these conclusions all be treated as pure findings of fact, the Circuit Court of Appeals was authorized by rule 52(a) to reverse them; for under the decisions of this court, the Circuit Court of Appeals has a clear right to set aside findings of evidentiary fact made by the District Court, if on a review of the entire record, the Circuit Court of Appeals is convinced the lower court's findings are wrong. In the case of *U. S.* v. *U. S. Gypsum Co.*, 68 Sup. Ct. 525, this court said that rule 52(a) authorized reviewing courts, in all actions tried upon the facts without a jury, to "reverse findings of fact by a trial court where 'clearly erroneous'". This court also said: "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court *on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*" (Emphasis added).

The action of the Circuit Court of Appeals was clearly in accord with the rule.

II.

Petitioner has advanced no reason for granting certiorari cognizable under rule 38(5) of this court.

Opposing counsel suggests that by the reversal of the District Court some injustice may have been worked. They talk of Vargas' virtual "slavery" for ten and one-half years under this contract. A condition of slavery which provides to the slaving party an average salary of $15,000.00 per year over the period of the contract, (Def's. Ex. 25, R. 750, 556) plus a probably average $5,000.00 additional per year from the sale of by-products, (R. 413) is at least the type of slavery for which many prominent commercial artists are searching.

Petitioner seeks to create the impression that he was overworked under the terms of the contract. He states (Pet'n, p. 5) that it ordinarily took him from ten days to two weeks to complete a drawing, although he did not so testify at the trial and the Court made no such finding. On the contrary, the Court found that in 1944 plaintiff produced for respondent 49 drawings, (Finding 47, R. 782) without making any complaint at the time that he was overworked. This was at the approximate rate of one picture a week. Vargas also was able to get away for his usual month's vacation in 1944, as was his annual custom during his association with Esquire. (R. 182) In addition to the 49 drawings, Vargas testified that in the same year he had sufficient time to make "very many" original pictures to send to the boys in service overseas. (R. 195.)

Petitioner's statement that the new contract doubled his work is also incorrect. Under both contracts it was expected that he would devote his entire time to the production of pictures for Esquire. No particular number of pictures was specified in Vargas' first contract, this being unnecessary since he was an employee, required to devote his entire working time to Esquire. But as an independent contractor under the second contract, it was necessary to stipulate as to the number of pictures required. However, the record shows that the number of pictures produced under the second contract was not substantially larger than under the first contract (Finding 7, R. 782), considering the additional number of pictures Vargas drew for sale to outsiders under the first contract. (R. 34)

Petitioner is again grossly inaccurate when he states that his pay under the second contract was to be less than he had received the last previous year of employment. As

pointed out in our statement of the case, Vargas in 1943, as the result of Esquire crediting to him sufficient money to wipe out his overdrafts, received $15,242.59. (Def's. Ex. 21, R. 738) It was during that year, however, that he received the extraordinarily large advance of $5,000.00 to bring his mother and sister from Peru to the United States. He could scarcely have expected to receive such an advance again during the next year. In the first year under the second contract Vargas earned a total of $13,827.87 (Def's. Ex. 21, R. 740), and in the second year he earned $15,245.63 (Def's. Ex. 21, R. 741). Each year thereafter his earnings would have necessarily increased, because of the sliding scale of earnings.

It is inaccurate to state, as petitioner does (Pet'n p. 5) that he was required under this contract to give up the use of his name at the end of the contract. The agreement provided that the names "Varga", "Varga Girl", and "Varga-Esq." were to belong exclusively to Esquire. These were coined names, theretofore adopted and copyrighted by Esquire for use in connection with the publication and promotion of Vargas' art work. Petitioner's name is and has always been "Vargas". At the end of the contract he, of course, was free to use *his* name in connection with his work and to advise that he had drawn the "Varga Girl" pictures for respondent's magazine. He would in that way reap substantial benefit from the advertising and promotion he had received during his association with Esquire.

There is no evidence in the record to support the trial court's speculation (Finding 46, R. 781) that if the plaintiff had understood the terms of the contract he would not have signed it. Furthermore, the finding is without legal significance since the trial court found that Vargas and his wife, who was born in the United States and

handled his business affairs, were "both capable of reading and understanding the English language at the time of the execution of the contract" (Finding 43, R. 781), and "that prior to the signing of the contract the plaintiff was requested by David Smart to read the contract, and both the plaintiff and his wife had an opportunity to read the contract before the plaintiff signed it as a party and his wife signed it as a witness". (Finding 44, R. 781.)

It is well settled under Illinois law that unless a person's signature to a contract is secured by some fraudulent trick, which was not here contended, he cannot complain that the contract does not contain what he expected, when he is capable of and has the opportunity to learn of its provisions by reading it. *Bundeson* v. *Lewis,* 368 Ill. 623, at 633, 15 N. E. (2d) 520; *Upton* v. *Trebilcock,* 91 U. S. 45, at 50, 23 L. Ed. 203; *Morel* v. *Masalski,* 333 Ill. 41, at 47, 164 N. E. 205.

In the instant case the Court, by implication at least (Finding 33, R. 780), found as a fact that Smart read the contract to Vargas down to the third paragraph. No complaint is made by Vargas that Smart misread or misrepresented the first two paragraphs of the contract. The only terms of the contract about which the Court found Vargas made complaint up to the time of filing suit (Finding 55, R. 783), namely, the amount of basic salary and the number of pictures to be produced, were contained in the portions of the contract read to Vargas. Vargas testified that Smart gave him the contract and told him, "You can go over there and check up on what I say", and that he, Vargas, sat down with the contract in his hand "to see what was what." (R. 99.) This admission on the part of Vargas eloquently demonstrates the absence of an essental element of fiduciary relationship, i. e.,

reliance by the subservient party on the dominant party. Vargas admitted he was by himself with the simple three and one-half page (letter size) double-spaced typewritten contract in his hands for at least five minutes. (R. 101.)

Vargas' own witness, Mr. Bartizal, testified that Vargas was asked, after studying the contract for some time, whether he was ready to sign the contract and that he answered "Yes". (R. 679.)

It is difficult to imagine what David Smart could have done to inform plaintiff of the terms of the contract other than what he did. He read to plaintiff the salient provisions of the contract, including all of those provisions objected to by plaintiff at the time of repudiation. He asked him whether or not he had any questions concerning the provisions read to him. (R. 494). Vargas replied that he had none. (R. 494.) He requested Vargas to read the contract himself, and his United States born wife, who handled many of his business affairs, was given an opportunity to read the contract. (Finding 44, R. 781.) It was our contention in both the trial court and the Circuit Court of Appeals that even if a fiduciary relation was assumed to exist, still the defendant had met the burden cast upon it of showing that the contract was fairly entered into.

Petitioner now asserts that the action of the Circuit Court of Appeals, in holding him bound by a simple three and one-half page contract, with no fine print; a contract which petitioner willingly signed, after it was read to him, and after he and his wife had checked it over; a contract which petitioner has already performed for two years with admitted satisfaction; a contract under which he has earned over $15,000 a year and under which he

must necessarily earn at least $18,000 a year, in addition to his percentage bonus, is a "gross miscarriage of justice."

We submit, on the contrary, that any other result would permit petitioner to walk out from under his obligations, and appropriate *for himself alone,* all the benefits of the tremendous promotional work which he had admittedly received from Esquire. While petitioner would understandably prefer to do less work and receive even more money than his contract provides, his own testimony demonstrates the contract to be fair; and no effort whatever was made on the trial to show that Vargas' services were actually worth more than he had received under the contract in question. We submit that not only the law, but the equities of this case lie with the respondent, and that the decision of the Circuit Court of Appeals is manifestly just.

III.

The order of the Circuit Court of Appeals remanding the case with directions to dismiss the complaint was a proper order.

All of the relief sought by petitioner in his complaint was based on the fundamental premise that the court would declare the contract null and void. When the reviewing court by its decision declared the contract binding and in effect, all of the other relief sought by petitioner fell. The Circuit Court of Appeals was entirely correct in describing this action as one to declare null and void or to set aside the contract. This was unmistakably the relief sought by the complaint. Therefore, the Circuit Court of Appeals' order, remanding this case with directions to dismiss the complaint, is a proper order.

Petitioner's prayer for relief asks (a) that the contract be declared null and void; (b)that the plaintiff recover, on the theory of *quantum meruit,* the reasonable value of pictures furnished by plaintiff to defendant as part of his 1946 quota; (c) that plaintiff have an accounting; (d) that defendant be enjoined from interfering with or preventing the employment of plaintiff by others; and (e) that plaintiff have such other general relief as might be deemed proper. (R. 13.)

Considering the relief sought, it is apparent that no questions are left for determination now that the contract has been found to be valid and in effect.

Since the contract has been found to be in force, plaintiff has no right to be paid on a *quantum meruit* basis, for pictures delivered under the contract as is sought in subsection (b) of the prayer for relief. All pictures have been paid for in accordance with the provisions of the contract. Furthermore, even under the decision of the trial court cancelling the contract as of January 10, 1946 (R. 785) plaintiff was not entitled to any of the relief sought under this subsection. During 1945 plaintiff delivered to defendant no more than his quota of drawings. (Finding 47, R. 782; Def's. Ex. 27, R. 751-753, 586) Plaintiff was compensated under the terms of the contract up to the end of 1945, and no pictures were furnished by plaintiff to defendant thereafter.

Plaintiff is not entitled to an accounting, as sought under subsection (c) of his prayer for relief. The terms of the contract governed entirely the measure of his compensation. Defendant's Exhibit 21, Record 735-742, contains a complete statement of account from July 1, 1940 to March 31, 1946. A subsequent statement of account was furnished to petitioner's counsel on May 12 1947,

which showed the status of Vargas' account with Esquire as of March 31, 1947, and which also represents the status of plaintiff's account with defendant as of the present time. The accuracy of these statements of account have never been questioned by plaintiff.

The relief sought under subsection (d), namely, that defendant be enjoined from interfering with or preventing plaintiff from working for others, is also based on the assumption that plaintiff's contract with defendant would be voided. When plaintiff advised defendant that he would deliver no additional pictures, as alleged in his complaint (R. 12), he was acting on the advice of counsel that his contract was voidable. Since the Circuit Court of Appeals reached the opposite conclusion, it must be assumed that the plaintiff will now elect to perform the contract rather than breach it. As alleged in our answer (R. 26), it is unnecessary for plaintiff to seek work from others, since the defendant stands ready to accept performance from him under the contract here in question. The only real controversy here was whether or not the contract was valid and binding, which question has been fully decided by the opinion and judgment of the court below.

Where the court has found the issues against plaintiff in a declaratory judgment suit, after a full hearing on the merits, it may either enter a decree so determining the rights of the parties, or a decree dismissing the complaint. Which form of decree is entered is a mere matter of form, which will not be reversed on appeal. *Boyar v. Krech*, 73 P. (2d) 1218, 1220; 10 Cal. (2d) 207.

In essence the plaintiff complains that the dismissal of the complaint does not give him a declaration of rights. This is not so. The opinion of the Circuit Court of Appeals is a complete declaration of the rights of the parties.

It becomes a mere matter of form as to whether the complaint should be dismissed or the trial court should enter a formal decree reiterating the declaration of rights by the Circuit Court.

This court will not grant certiorari merely to correct the judgment of the court below as to a matter of form.

CONCLUSION.

It is respectfully submitted that the petitioner has shown no reason for the granting of a writ of certiorari to the Circuit Court of Appeals to review this case, and the issuance of the writ should be denied.

Respectfully submitted,

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